Liew Wai Kuan v Ong Koh Hou @ Won Kok Fong & Anor

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S1-33-1189 OF 1998
MOHD SAARI J
6 MARCH 2000

Family Law *— Divorce — Decree nisi granted — Application for setting aside of decree nisi — Whether valid grounds shown for setting aside*

The petitioner filed for divorce with the first respondent on grounds inter alia that the first respondent had committed adultery. On the hearing of the petition, the first respondent indicated that he had no objection to the dissolution of the marriage and an order of decree nisi was accordingly granted. The first respondent later applied to set aside the decree nisi on the grounds that it was a consent order and it was prejudicial to the interest of the first respondent in that it would appear as if the marriage had broken down as a result of adultery. At the hearing of the first respondent's application, the decree nisi had not been perfected nor set aside.

Held, dismissing the first respondent's application:

(1) The proper remedy in this case would be to lodge an appeal as the relief sought was the setting aside of the decree nisi with a view of rehearing the petition (see p 244D).

(2) The first respondent had admitted consenting to the petition for dissolving the marriage. Thus there was no valid ground for the court to set aside the order (see p 243D–E).

[Bahasa Malaysia summary

Pempetisyen telah memfail untuk bercerai daripada penentang pertama atas alasan, antara lain, bahawa penentang pertama telah melakukan perzinaan. Atas pembicaraan petisyen tersebut, penentang pertama memaklumkan bahawa beliau tidak mempunyai sebarang bantahan terhdap pembubaran perkahwinan tersebut dan satu perintah decree nisi telah diberikan dengan sepatutnya. Penentang pertama kemudiannya memohon supaya decree nisi diketepikan berdasarkan alasan bahawa ia adalah satu perintah persetujuan dan adalah memudaratkan kepada kepentingan penentang pertama dalam ertikata ia kelihatan seolah-olah perkahwinan itu telah retak akibat perzinaan. Di pembicaraan permohonan penentang pertama, decree nisi itu belum disempurnakan atau diketepikan.

Diputuskan, menolak permohonan penentang pertama:

(1) Remedi yang betul dalam kes ini adalah untuk mengemukakan satu rayuan kerana relief yang diminta adalah pengenepian decree

nisi dengan pandangan untuk membicarakan semula petisyen tersebut (lihat ms 244D).

(2) Penentang pertama telah mengaku bersetuju kepada petisyen untuk membubarkan perkahwinan. Justeru itu tiada alasan sah untuk mahkamah mengetepikan perintah tersebut (lihat ms 243D–E).]

Notes

For cases on divorce proceedings generally, see 7 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2725–2937.

Cases referred to

Chee Kuan Cheng v Chuo Kong Kah [1967] 2 MLJ 74 (refd)

Phang Kim Seng v Jenny Lye and Zakaria bin Md Saad Divorce Petition No 176/1984, unreported (refd)

Syarikat Mara Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd [1991] 2 MLJ 417 (refd)

Legislation referred to

Law Reform Act 1976 s 106

Rules of the High Court 1980 O 20 r 11

M Manoharan (*Karpal Singh & Co*) for the petitioner/wife.

JA Yeoh (*Shearn Delamore & Co*) for the respondent/husband.

Mohd Saari J: In the notice of motion (encl 21), the applicant (husband) applies to set aside the decree nisi granted by this court on 4 March 1999.

Brief facts

In her petition, it was stated that the petitioner (wife) was lawfully married to the first respondent on 30 March 1980. The petitioner lived and cohabited with the first respondent at No 47 Jalan Sarjana 5, Taman Connaught off Jalan Cheras, 56100 Kuala Lumpur. The petitioner had three children by the marriage to the first respondent. The first respondent has committed adultery with the second respondent since 1990. The first respondent had three children by the second respondent. Further, in the course of their marriage, the first respondent had beaten and intimidated the petitioner. The petitioner prayed, inter alia, for the marriage to be dissolved.

On the hearing of the petition on 4 March 1999, upon learned counsel for the first respondent indicating to the court that his client had no objection to dissolving the marriage, the court granted decree nisi to be made absolute within three months from the date of the court order. The said court order has not been perfected. Further, it may be noted that there is no stay of execution of the court order. At the time of the hearing, the first respondent was present. Then, cause papers were not served on the second respondent and the person cited.

Issue

The issue for determination is whether the first respondent (husband) has a valid ground for setting aside the decree nisi.

Finding

In his submission, En Yeoh said that the court order granted on 4 March 1999 was a consent order. In the Federal Court case of *Chee Kuan Cheng v Chuo Kong Kah* [1967] 2 MLJ 74, in a partnership action, settlement was reached between counsel on terms agreed to by both parties. Later, the plaintiff made an application to set aside the order contending that he had given his consent under misapprehension. The court held that as the plaintiff fully understood the terms of the settlement and agreed thereto and neither the plaintiff nor his counsel was under any misapprehension as to any of the terms agreed upon which were embodied in the consent order the consent was not given under a misapprehension or from a misstatement or want of materials. Further, the terms of the settlement were not only fair but of practical advantage to the appellant.

The main ground in support of this motion is that the court order is prejudicial to the interest of the first respondent in that it would appear as if the said marriage had broken down as a result of adultery. Turning to the affidavit of the first respondent (encl 16), he admitted consenting to the petition for dissolving the marriage. Thus, in applying the ratio decidendi in *Chee Kuan Cheng*'s case to the facts of the instant case, there is no valid ground for this court to set aside the court order. According to the petition, there were attempts to reconcile the marriage pursuant to s 106 of the Law Reform Act 1976 but those failed. So, it would be in the best interest of both parties to settle the case.

In *Phang Kim Seng v Jenny Lye and Zakaria bin Md Saad* in Divorce Petition No 176/1984 (unreported), his Lordship Mohd Dzaiddin J (as he then was) said:

> In my judgment, on the strength of the evidence of the petitioner alone I am satisfied that the marriage has irretrievably broken down by reason of adultery admitted by the respondent and that the petitioner, on his own admission finds it intolerable to live with the respondent. In my opinion, it is not necessary for this court to hear the evidence of the respondent to grant a decree of divorce.

On appeal vide SCA No 316/1985, the decree nisi was set aside on the ground that full hearing of the case was not completed. The facts of the case are distinguishable. In the instant case, the first respondent, through his counsel, had no objection to the application for dissolving the marriage.

Looking from another perspective, from perusal of notes of proceeding, what actually transpired was that learned counsel for the first respondent had no objection to the first prayer of the petition, which is an application for dissolving the marriage. So, it would be a misnomer to describe the court order as a consent order.

In *Syarikat Mara Jaya Sdn Bhd v Syarikat Masinda Sdn Bhd* [1991] 2 MLJ 417 at p 420, Peh Swee Chin J (as he then was) said:

> To revert to the instant case, the order in question had not been extracted or perfected, but as regards the power of re-considering it, the order in question not being a consent order, what would be actually the nature of such power to be exercised?

This court was much exercised by this problem. In my view, the nature of this power is not a blanket one; *it is subject to a restriction which is. To correct an error in the order itself where the order made does not express the court's manifest intention in the matter or in other words it is not conformable with such manifest intention of the court. It does not allow a court to make a fundamentally different order.* The power is exercised concurrently with the express power to correct any clerical error, or any error arising from accidental slip or omission as expressly conferred by O 20 r 11 of the Rules of the High Court 1980. (Emphasis added.)

To revert to the instant case, the first respondent is seeking relief to set aside the decree nisi with the view of rehearing the petition, which, on the authority of the aforesaid case, would not be proper. As observed by the learned judge in that case, where the proposed correction to a court order is fundamentally different, the proper remedy would be to lodge an appeal. Further, if the court were to rehear the petition, it would mean that there would be no finality in litigation.

In the premises and for reasons given above, the notice of motion (encl 21) is dismissed with costs.

Notice of motion dismissed.

Reported by Andrew Christopher Simon